Petition

81-1939

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FRED C. BARKSDALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether prior judicial approval is required before Internal Revenue Service Agents may have a client telephone the client's lawyer, with consent, in a successful attempt to obtain tape recorded incriminating statements pertaining to a pending tax fraud investigation?

PARTIES BELOW

United States of America

Fred C. Barksdale

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No.

FRED C. BARKSDALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Fred C. Barksdale petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Opinion of the Court of Appeals is not reported but is included in the Appendix herein.

JURISDICTION

The decision of the Court of Appeals was announced on December 30, 1981. A Petition for Rehearing was timely filed and was denied on February 19, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

On May 6, 1980, Fred C. Barksdale was indicted by a federal grand jury sitting at Tampa, Florida. The Indictment charged Barksdale with subscribing a false income tax return for 1975 (Count One) and 1976 (Count Two), in violation of Title 26, United States Code, Section 7206(1), and with four counts of endeavoring to obstruct a criminal investigation in violation of Title 18, United States Code, Section 1510. The tax-related charges specified that Barksdale had underreported his income from interest payments and from his law practice for the two years in question.

On October 17, 1980 verdicts of guilty were returned as to all Counts except Count Three, which was one of the obstruction counts. A verdict of not guilty was returned as to Count Three. Barksdale was sentenced to three years as to Counts One, Two and Four, to run concurrently with each other, and three years as to Counts Five and Six, to run consecutively to the sentence imposed under Count Four.

The Internal Revenue Service conducted an extensive investigation of the 1975 and 1976 federal income tax returns of Fred C. Barksdale, an attorney then practicing

in Tampa, Florida, prior to the return of the Indictment in this case.

During the course of the investigation the IRS special agents received information which lead them to believe that Barksdale may be attempting to obstruct the investigation by informing a client not to cooperate with the investigators. The jury ultimately acquitted Barksdale of this alleged obstruction (Count Three).

As part of their investigation the special agents contacted three clients of attorney Barksdale; Bruce Keneagy, William Eckhardt and Enrique Duarte. The agents induced them to call Barksdale by telephone at Barksdale's law office. The clients were each asked to inform Mr. Barksdale that he had been contacted by the IRS concerning monies paid to Barksdale during 1975 or 1976 during Barksdale's legal representation of him. The telephone calls were placed to Barksdale at his law office by each of the clients as requested.

With the consent of each of the three clients (Keneagy, Eckhardt and Duarte) tape recording were made by the IRS agents of each conversation (R-32, Exhibits 1, 2 and 3 reflect the consents).

During the Government's case-in-chief, four tape recordings were introduced into evidence over Barksdale's objections (Government Exhibit Nos. 103, 104, 58 and 54). There were two tapes of Barksdale talking to Keneagy (Government Exhibits Nos. 103 and 104), since there were two calls involving him and Barksdale. There was one tape of Barksdale talking with Eckhardt (Government Exhibit No. 58) and one tape of Barksdale talking with Duarte (Government Exhibit No. 54).

Transcripts of these recordings were utilized by the jury

during the playing of the tapes at trial (Government Exhibit No. 230 (a), (b), (c) and (d). The jury also was permitted to play the tapes during their deliberations.

In the course of one or more of the conversations, Barksdale suggested or requested that the client destroy any receipts he may have; that the witness forget how much he paid Barksdale; or to advise the agents that he paid Barksdale only $200 or $300.

No warrant or judicial approval was sought or obtained by the agents before the telephone calls were placed and the tape recordings obtained.

During the course of the investigation the IRS agents had contacted Barksdale and had given him non-custodial *Miranda* warnings. These warnings were given in 1978, before the telephone calls and tape recordings were made in 1979. Barksdale had obtained counsel to represent him in the investigation in 1978 and after he was given the *Miranda* warnings the IRS agents were told that Barksdale did not wish to speak with government agents.

ARGUMENT OF REASONS FOR GRANTING THE WRIT

The question in this Petition presents an important question of federal law pertaining to the use of a client of an attorney as an informer, or undercover agent, in obtaining tape recorded conversations between the attorney and client for use as evidence against the attorney, without prior judicial approval. This question has not been, but should be settled by this Court. The actions of the IRS agents, and the Trial Court, approved by the Court below, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Whether prior judicial approval is required before Internal Revenue Service Agents may have a client telephone the client's lawyer, with consent, in a successful attempt to obtain tape recorded incriminating statements pertaining to a pending tax fraud investigation?

a) The attorney-client relationship involves an intimate process of consultation and planning which culminates in a state of trust between the client and his attorney. The outcome of a trial, or representation other than trial, often hinges on the extent to which the attorney is able to communicate with his client and the extent of trust between the attorney and client.

The actions of the IRS agents in having a purported client to call his attorney, without prior judicial approval, to conduct, in essence, and auditory search, if permitted by this Court, places an unreasonable chilling effect upon an attorney's association with his client. Such an association should be free from IRS interference unless, and until, such government agents obtain prior judicial approval for such actions as occurred in this case.

The First Amendment included the right to form associations freely and to conduct affairs without surveillance by "the spy, the mouchard, the dilater, the informer, and the sycophant" or "police government". Francis Lieber, *On Civil Liberty and Self Government,* (1853), 103-105, 224-225.

Must an attorney forevermore wonder whether a client who calls is in reality an IRS or police spy, induced to call the attorney in an attempt to get incriminating statements, without even the protection of prior judicial approval?

b) Lieber also contended in 1853 that the First Amend-

ment was also meant to insure the liberty of silence (the right not to have to speak). The First Amendment gives freedom of mind and of thought and creates a preserve where the views of the individual are made inviolate. *Baird v. State Bar of Arizona,* 401 U.S. 1, 5-6 (1971). The right of freedom of thought includes *the right to refrain from speaking at all.* The right to speak and the right to refrain from speaking are complimentary components of the broader concept of individual freedom of mind. *Wooley v. Maynard,* 430 U.S. 705, 714-715 (1977).

Fred Barksdale testified in this case that he thought he was being harassed by the special agents of the IRS during their investigation of him in 1978 and 1979. In that emotional state he harbored unexpressed thoughts and desires that his clients not cooperate with the IRS in the believed harassment of him. *Barksdale, however did not initiate the telephone calls which were tape recorded.* The IRS initiated those telephone calls by inducing his clients to call and the IRS tape recorded the calls without any prior judicial approval.

If Barksdale had been left alone with his thoughts, however undesirable those thoughts were, they would not have been expressed to Keneagy, Eckhardt and Duarte in 1979.

The words of Justice Brandeis should be valued more today than when first written:

> "The makers of our Constitution undertook to . . . protect Americans in their . . . thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and

> the right most valued by civilized man." *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) *Accord, Stanley v. Georgia,* 394 U.S. 557, 564 (1969).

At the minimum, prior judicial approval should be required before actions, such as occurred here, are undertaken by IRS agents to violate a citizen's right to be left alone with his thoughts.

c) The testimony of Keneagy, Eckhardt and Duarte should be suppressed as a product of a violation of the Fourth Amendment. The information to which the named individuals testified was obtained by an auditory search of the Defendant's law office. The Defendant was in each instance apparently called by the client of Barksdale at the instance of the Government Agents for the purpose of recording their conversations with the Defendant. Those agents of the Government were thereby searching the Defendant's law office and what they heard was a product of the search.

Although amplification or recording is relevant to the reasonableness of a search, it is manifest that neither is essential to the making of an auditory search. As the Court said in *Wong Sun v. United States,* 371 U.S. 471, 485, "It follows from our holding in *Silverman v. United States.* . . . that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure or 'papers and effects'.".

If each of the clients would have been a concealed eavesdropper within the Defendant's law office there could be no question but that the overhearings would have

been the fruits of a search violative of the Fourth Amendment. The Defendant did not consent to the entry of the clients into his office because of their concealment of their role as a Government spy and by their passing themselves off as a client of the Defendant. An entering into private quarters procured on pretense of a legal visit by one intending to conduct a search for the police is an unauthorized intrusion for Fourth Amendment purposes as a forced entry. *Gouled v. United States,* 255 U.S. 298.

The IRS activities in sending a client to Barksdale's law office (via the telephone) and in electronically listening to and recording Barksdale's words violated the privacy upon which he justifiably relied while talking to a client over a telephone in his law office and this constituted a "search and seizure" within the meaning of the Fourth Amendment. The IRS agents ignored "the procedure of antecedent justification. . . that is central to the Fourth Amendment". *Osborn v. United States,* 385 U.S. 323, 330, 87 S. Ct. 429, 433 (1966). See *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507 (1967).

Osborn, supra, is the closest case in which this Court has considered placing an informer in a law office to tape record an attorney's conversation. It is important to note that *prior judicial approval* was obtained in that case and the procedure was warmly embraced by this Court in *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507 (1967) and in *Berger v. New York,* 388 U.S. 41 (1967).

Barksdale did not assume the risk of speaking with the purported clients. By his professional requirements, he had to accept and respond to telephone calls from clients or former clients who need (allegedly) his assistance. Thus although there is a reasonable risk-assumption factor ap-

parently considered in cases such as *On Lee v. United States,* 342 U.S. 747 and *Lopez v. United States,* 373 U.S. 425, this factor should not be considered in this instance where the attorney is in essence required to assume the risk by the fact of his professional requirements.

In like manner neither *United States v. White,* 401 U.S. 745 (1971), nor *Hoffa v. United States,* 385 U.S. 293 (1966), controls this situation. These cases hold that the Fourth Amendment affords no protection to a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.

Barksdale did not *voluntarily* speak with his clients. The clients initiated the conversation, and the subject of the conversation, at the request of the IRS agents. Barksdale's professional duties as an attorney required him to respond to the calls to his office from his clients and to speak with them. If the calls had not been made, the words would not otherwise have been spoken. There was no voluntariness as was the case in *White* and *Hoffa.*

The "broader spirit" of the Fourth Amendment "shields private speech from unreasonable surveillance". *United States v. United States District Court,* 407 U.S. 297 (1972). It may well be that the IRS agents' actions were such that they would have gained judicial approval. The Fourth Amendment, however, contemplates a *prior* judicial judgment and the inadequate check upon executive discretion is not satisfied by post-surveillance judicial review. Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights. *Beck v. Ohio,* 379 U.S. 89 (1964).

d) The IRS agents gave *Miranda* warnings to Barksdale in a non-custodial setting despite circuit court decisions suppressing statements taken in violation of those rules.

United States v. Sourapas, 515 F.2d 295 (CA9, 1975); *United States v. Leahey,* 434 F.2d 7 (CA1, 1970); *United States v. Heffner,* 420 F.2d 809 (CA4, 1969).

Barksdale informed the IRS that he did not wish to speak with government agents. Barksdale was known to be represented by his attorney. Notwithstanding Barksdale's expressed desires, given in response to the warnings, the IRS still compelled him to speak (and in the absence of his attorney) to the client/agents by the solicited telephone calls.

CONCLUSION

The totality of the actions of the IRS agents in this case violated the requirements of due process required by the Fifth Amendment.

For the reasons stated herein, Petitioner respectfully submits that this case presents an issue of exceptional public importance, and with a probability of recurrence. This Court should issue its Writ of Certiorari to the Court of Appeals and call up the record in this case for plenary consideration, and upon consideration, to reverse the Court's judgment and remand the case for such further proceedings as may be appropriate.

Respectfully submitted,

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Appendix

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 80-6005

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRED C. BARKSDALE,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(December 30, 1981)

Before RONEY and FAY, Circuit Judges, and EDENFIELD*, District Judge.

PER CURIAM:

On this appeal from a five count criminal conviction for filing false tax returns and obstructing a criminal investigation, the defendant essentially argues he did not get a fair trial because of the way the Government investigated the case and the way the prosecution

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*The Honorable Newell Edenfield, United States District Judge for the Northern District of Georgia, sitting by designation. He was a member of the panel that heard oral arguments but due to his death on December 26, 1981, did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

tried the case. He levels a series of attacks on the Government conduct at the trial: improper character assassination; inference that evidence not before the jury supported the prosecution; admission of tape recordings and testimony of the defendant attorney talking with his clients; abuse of the subpoena process; abuse of the grand jury system; and denial of the right of confrontation. He challenges the mailing of approximately 2000 form letters to possible clients of defendant in the investigation. He asks this Court to reverse his conviction and remand the case for a new trial.

We have thoroughly studied the briefs filed on this appeal and a substantial part of the 35-volume – 5600 page record. We have taken into full consideration the defendant's argument that if individual points are not sufficient of reversal, an overall view of the case requires this Court to reverse either under established notions of fairness under the due process clause of the Fifth Amendment, or under the Court's supervisory authority in the interest of justice. After careful study, it is our judgment that the convictions must stand. The nature of the charges made the prosecution difficult. The trial was long, involved a multitude of witnesses and documents, and was hard fought by capable attorneys on both sides. In such cases there is often some conduct of all counsel that is not textbook perfect. A review of the record, however, reveals no reversible errors committed by the trial court nor Government conduct egregious enough to give the case the level of unfairness argued by the defendant.

AFFIRMED.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 80-6005

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRED C. BARKSDALE,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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Court of Appeals
ELEVEN CIRCUIT
FILED
FEB 19, 1982
NORMAN E. ZOLLER
Clerk

ON PETITION FOR REHEARING

(February 19, 1982)

Before RONEY and FAY, Circuit Judges, and EDENFIELD*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:
/s/ Paul H. Roney
UNITED STATES CIRCUIT JUDGE

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*The Honorable Newell Edenfield, United States District Judge for the Northern District of Georgia, sitting by designation. He was a member of the panel that heard oral arguments but due to his death on December 26, 1981, did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 80-6005

Court of Appeals
ELEVEN CIRCUIT
FILED
MAR 29, 1982
NORMAN E. ZOLLER
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRED C. BARKSDALE,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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ORDER:

(X) The motion of Appellant for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellant for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk

of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ Paul H. Roney

UNITED STATES CIRCUIT JUDGE